In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 681

PINKNEY HESTER ICENHOUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Southern District of Georgia on four counts of an indictment which charged him with having in his possession and custody an unregistered still, carrying on the business of a distiller without having given bond as required by law, carrying on that business with the intent to defraud the United States of taxes, and unlawfully possessing distilled spirits which did not bear tax-paid stamps. The Court of Appeals, on October 16, 1950, affirmed the conviction, stating that (R. 67;[1] 184 F. 2d 574)—

[1] The first sheet of the proceedings after the remand by this Court (*infra*) is numbered the same (66 and 67) as the last sheet of the prior proceedings.

> * * * defendant is here insisting that the verdict is wholly unsupported by evidence.
>
> The United States, calling our attention to the fact that the defendant failed to move for an instructed verdict, insists that this is not a case where justice requires a reversal notwithstanding such failure.
>
> We agree. * * *

Following that decision, petitioner filed a petition for a writ of certiorari (No. 406, O. T. 1950), his contention being that the evidence was insufficient to support the conviction. Petitioner also asserted that the Court of Appeals erroneously stated that he had failed to move for an instructed verdict. We agreed with petitioner that the import of his counsel's motion at the close of the Government's case was a request for an acquittal (Brief in Opposition, pp. 6–7, fn. 2). This Court, stating that the "Government having conceded that petitioner moved for an instructed verdict," granted the petition, vacated the judgment of the Court of Appeals, and remanded the case to that court for further consideration. 340 U. S. 908.

On the remand, the Court of Appeals reviewed the evidence, found it sufficient to support petitioner's conviction, and again affirmed (R. 67–69).

Petitioner again contends, as in his prior petition, that the evidence is insufficient to sustain his conviction. We therefore invite attention to

our brief in opposition to that petition, where we summarized the evidence and showed that it amply supports the conviction. Now that the Court of Appeals has reviewed the sufficiency of the evidence and held that the trial court was right in submitting the case to the jury (R. 69), we submit that there is no occasion for further review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1951.

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